

be gainsaid that it is only one of the factors to be considered. A

The cases relied on by Mr. O. Phipps can be easily distinguished. As already noted, they concerned disputes between members of the governing bodies of companies. This is perhaps strictly not such a case. But it is to be borne in mind that the 3rd plaintiff was a previous director and that the 2nd and 8th defendants had now resigned from the board. I do not consider that the facts are without significance, but even without taking them into consideration, it will be seen that there is a common factor, the preservation of a company's assets which also involves in turn the proper management of its affairs. In such a situation, the following passage from *Malins V.C.* from his judgment in *Featherstone v. Cooke, supra*:

"With regard to private partnerships, nothing is of more frequent occurrence than the quarrel of partners. If parties quarrel, oust each other from the management, or so conduct themselves that the partnership cannot go with advantage it is every day's practice for the court to interfere by injunction and appoint a receiver if necessary. With regard to public companies, I apprehend the same principle is applicable. If a state of things exists in which the governing body are so divided that they cannot act together, and there is the same kind of feeling between the members as there is frequently in the case of private partnerships, it is clearly within the rule of this court to interfere and it will do so."

appears apt and applicable. I am aware that this is not an action by debenture-holders nor is it a winding-up petition, but since it does not serve the purpose of the shareholders, considered as a whole, that this transport business with its enormous potentials and directed for the benefit of the bumiputras, to have the company wound-up, then it seems to me that where the assets are in jeopardy, and in the circumstances of the serious disputes among the shareholders, the only way to save the company and to ensure its continued operations would be to appoint a receiver as well as a manager.

The appointment will be limited until the affairs of the company are sorted out and until it is ascertained who are the duly constituted directors.

I would however venture a hope made in the interests of all concerned that a board of directors may soon be in control who will command the support of the shareholders, so that the company can be run as a going concern and the spate of litigation that is at present bedeviling the fortunes of this company will be abated.

Order accordingly.

YAP CHAI CHAI & ANOR. v. PUBLIC PROSECUTOR

[F.C. (Ong C.J., Gill and Ong Hock Sim FJJ.)

February 13, 1973]

[Ipoh — Federal Court Criminal Appeal No. 23 of 1972]

Criminal Law and Procedure — Whether mandatory for trial judge to enter on record his opinion that there was case to answer at the end of prosecution case — Murder — Penal Code, s. 34 and 302.

Criminal Procedure Code (s.s. Cap. 21) s. 125(1) — Confession recorded by magistrate — Retracted confession.

Evidence Act, 1950, s. 30 — Confession by co-accused — Taking into consideration confession against other accused.

This was an appeal against the conviction of the appellants for murder. On appeal it was argued (1) that it was mandatory for the trial judge at the close of the prosecution to enter on the record his opinion that there was a case to answer and that his failure to do so rendered the trial a nullity; (2) the confession of the second appellant which was retracted, was wrongly admitted in evidence; (3) the second appellant's confession should not have been used or considered as evidence against the first appellant, of common intention.

Held: (1) it is not mandatory for the trial judge at the close of the prosecution to record his opinion that there was a case to answer. The facts in this case established a *prima facie* case and the learned trial judge would have been wrong to withdraw the case at that stage from the jury;

(2) even if the retracted confessional statements of the second appellant have been wrongly admitted, the verdict was the right one and resulted in no miscarriage of Justice; but on the facts the statements were rightly admitted;

(3) the confession of the second appellant was rightly taken into consideration against the first appellant.

Per Ong C.J.: "We do not think that the provisions of section 204(2) of the Criminal Procedure Code (S.S.) had any application, nor do we agree with the contention... that it was mandatory for the judge at the close of the prosecution to enter on the record his opinion that there was a case to answer — the failure to do so rendering the trial a nullity. As authority for this proposition two cases were cited to us, being the judgements delivered by Willan C.J. in *Ng Peng Choon v. Public Prosecutor*⁽¹⁾ and *Govindasamy v. Public Prosecutor*.⁽²⁾ In our opinion the provisions relating to trials with assessors, as in those cases, have no application to jury trials; in any event, we must say, with all respect, that we unanimously disagree with the learned Chief Justice. What is always of paramount importance in the administration of criminal justice is a fair trial — not such excessive legalism as to give the ordinary meaning of words the sacrosanctity of a ritual."

Cases referred to:-

- (1) *Ng Peng Choon v. Public Prosecutor* [1947] M.L.J. 87.
- (2) *Govindasamy v. Public Prosecutor* [1949] M.L.J. 101.
- (3) *Reg. v. Hester* [1972] 3 W.L.R. 910, 930.
- (4) *Director of Public Prosecutions v. Kilbourne*, [1973] 2 W.L.R. 254.
- (5) *Abdullah bin Awang Bongkok v. Public Prosecutor* [1956] M.L.J. 90.
- (6) *Herchun Singh & Ors. v. Public Prosecutor* [1969] 2 M.L.J. 209, 211.

FEDERAL COURT.

A. Krishnan for the first appellant.

Datuk S. P. Seenivasagam (R. Rajasingham with him) for second appellant.

Gunn Chit Tuan (Deputy Public Prosecutor) for respondent.

Ong C.J.: The appellants were tried in the High Court at Penang before a special jury on a charge of murder as follows:—

"That you jointly with one other still at large on the 2nd day of October, 1971 at about 10.10 p.m. at premises No. 3963, Heng Choon Thian Road, in the District of Butterworth, in the State of Penang, in furtherance of a common intention of all, committed murder by causing the death of one Chan Khoo Khew (m) and that you have thereby committed an offence punishable under section 302 read with section 34 of the Penal Code."

The jury returned an unanimous verdict of guilty against both appellants and they were sentenced to death. They both appealed against such conviction.

The offence alleged arose in the course of an attempted armed robbery when three men raided a goldsmith's shop. They met with resistance by the goldsmith, and in the course of the struggle and shooting it would appear that one of his assailants was so severely injured somehow in the leg that this man was seen limping and had to be supported by a comrade of his to make his escape. To overpower the goldsmith the intruders shot him four times and also struck his head so forcibly as to cause a fracture of his skull. One of the shots penetrated his brain and was the immediate cause of his death. The skull fracture, according to the medical evidence, would also have been fatal. A second shot fired at close range passed through his left cheek; the third, also from close range, entered his abdomen, and the fourth was fired into his chest. Before leaving, one of the intruders snatched a gold chain from the goldsmith's wife and then shot the defenceless woman in the abdomen.

Four shells and one slug were recovered from the house that night by the police. They were of .25 calibre. Two of the three slugs recovered in an autopsy on the goldsmith and the slug removed in an operation on the wife were all of .25 calibre. The other slug recovered from the goldsmith was of .22 calibre.

The inference to be drawn — as the learned trial judge pointed out to the jury — was obvious, that the person who was armed with the .25 weapon fired at both the goldsmith and his wife. It further meant that another person using a .22 firearm also shot the goldsmith. A toy-pistol was recovered from the house. As two of the trio must have carried genuine loaded firearms, the third man must have carried the toy-pistol.

The goldsmith's wife failed to identify either of the appellants. But a near-by kuay-teow seller (PW10) and a neighbour of the deceased (PW11) positively identified the first appellant as the person leaving the house after the shooting with a pronounced limp requiring him to be assisted by another person across the road to their waiting car. The same kuay-teow seller also identified the second appellant as the driver, although the neighbour was unable to do so. As for the identification parades, we agree entirely with the trial judge that there was no doubt as to their propriety and that the police officer who conducted the parade at the hospital in which first appellant was identified, deserved high commendation for the manner

A he arranged it, which was beyond criticism. Apart from the identification of both appellants, there was clear evidence of the second appellant having, prior to the incident, hired a car of similar make and colour to the one used by the gang which was seen by both the kuay-teow seller and neighbour when it was driven away. This car was recognised as an identical vehicle by the same two witnesses and there was evidence that it was returned to the hirer by the second accused on the day after the event.

The next relevant witness was one Saw Hung Song, a farmer, who stated that, at about 11 p.m. on the night of the robbery, and shortly after the event, the second appellant, who was his friend, brought the first appellant and a third man for whom he sought shelter. Saw had not previously known these two others. The next morning, the third person departed, leaving in Saw's custody a .22 revolver. Later, before the first appellant departed, he, too, in the presence of the second appellant, handed to Saw a .25 revolver for safe-keeping. When eventually the police came to his house with the second appellant, within 48 hours after the latter's arrest, Saw brought out a tin hidden by him in a junk-pile containing both firearms.

Evidence of ballistic experts established conclusively that the .25 automatic discharged the 3 slugs found in the deceased's body and one other slug recovered from the goldsmith's wife. The .22 slug recovered at the deceased's autopsy was found so severely damaged as to be unsuitable for comparison tests. The Government Chemist was unable to say whether this .22 slug was fired from the .22 revolver examined by him. If it was, then (as the judge pointed out to the jury) it was the logical explanation why shells from the .25 automatic were recovered in the house, but none from the .22 revolver which would retain empty shells in their chambers.

From such evidence alone, apart from the testimony of Saw Hung Song, the judge directed the jury to draw their own conclusions, whether the discovery of the revolver and automatic together was an extraordinary coincidence or should lead reasonably to the inference that both these weapons had been used at the house of the goldsmith. As regards Saw, the judge took special care to warn the jury that this man might well be treated as an accomplice whose evidence it would be unsafe and dangerous to accept without independent corroboration.

The prosecution further produced in evidence a statement made by the second appellant to the magistrate at Butterworth on November 3, 1971. After a trial within the trial — during which the second appellant gave evidence on oath that it was made as a result of torture inflicted on him by various police officers since October 27, 1971 — the judge was nevertheless fully satisfied that the allegations made against the police were false. The judge was further amply satisfied that the statement had been voluntarily made and without any inducement, threat or promise. Still, he took the precaution of reminding the jury that it was for them to decide whether they accepted the statement as voluntary and the weight they chose to attach to it.

At the hearing of this appeal the main plank in the platform of the arguments of counsel for both appellants was that the statement was inadmissible and that, but for the wrongful admission thereof, there would have been insufficient prosecution evidence for the case to go to the jury. There were other criticisms of the summing-up, but with all respect to counsel, we considered them wholly groundless in so far as complaints of non-direction and misdirection were concerned. The summing-up in our opinion was impeccable and it was plain from a perusal thereof that great pains were taken to exclude any evidence of doubtful admissibility prejudicial to the defence.

Leaving aside for the moment the second appellant's statement, we are clearly of opinion that the facts which were indisputable had established a clear *prima facie* case, and that the learned trial judge would have been wrong to withdraw the case at that stage from the jury. We do not think that the provisions of section 204(2) of the Criminal Procedure Code (S.S.) had any application, nor do we agree with the contention of Datuk S. P. Seenivasagam that it was mandatory for the judge at the close of the prosecution to enter on the record his opinion that there was a case to answer — the failure to do so rendering the trial a nullity. As authority for this proposition two cases were cited to us, being the judgments delivered by Willan C.J. in *Ng Peng Choon v. Public Prosecutor*⁽¹⁾ and *Govindasamy v. Public Prosecutor*.⁽²⁾ In our opinion the provisions relating to trials with assessors, as in those cases, have no application to jury trials; in any event, we must say, with all respect, that we unanimously disagree with the learned Chief Justice. What is always of paramount importance in the administration of criminal justice is a fair trial — not such excessive legalism as to give the ordinary meaning of words the sacrosanctity of a ritual.

The established facts had to be faced and they clearly did establish a *prima facie* case. The robbery was a planned operation. The car was hired by the second appellant a day prior to the attempted robbery and false number plates provided for use before and after the event. It was unthinkable that those intending to participate gave no thought to how they were to provide themselves with weapons necessary to intimidate and, if necessary, overpower their victims or deal with people obstructing their escape. Consequently it was a logical inference of common intention that all three participants must have known or contemplated that two of them would be ready to use lethal weapons. Had those firearms been unserviceable or unloaded, then it might plausibly have been suggested that there was no intention to use those weapons and no common intention to rely on them. The shooting of the goldsmith, not once but four times, was proof of deadly intent. Not content with shooting at vital portions of the goldsmith's body, his wife was also shot in the abdomen, although she offered no resistance or obstacle to their escape. All that remained to be proved was the identity of the appellants. This was provided by the identification parades and the hiring of the car. If there was still any lingering doubt regarding the possibility of mistaken identification, then we think the evidence of Saw (however unreliable by itself) and that of the independent witnesses PW10 and PW11

A were mutually corroborative: see *Reg v. Hester*⁽³⁾ and the most recent decision of the House of Lords in *Director of Public Prosecutions v. Kilbourne*.⁽⁴⁾

Even had the retracted confessional statement been wrongly admitted we were clearly of opinion that the verdict was the right one and resulted in no miscarriage of justice. But, in our view, the statement was quite rightly admitted. We agree with the learned trial judge that when the magistrate declined to record the second appellant's statement on October 27, 1971, he did so from an abundance of caution, for the mere fact that this appellant was informed by a senior police officer of the proper way to set about making his confession by doing so before a magistrate was by itself not intrinsic evidence of coercion, inducement, threat or promise, which this appellant had expressly denied as motivating his decision. Section 125(1) of the Criminal Procedure Code (S.S.) peremptorily requires police officers or any other person in authority to refrain from offering any sort of inducement, threat or promise whatsoever to any person charged with an offence inducing him to make any statement having reference to the charge against him. But, where such person has made a statement in the course of police investigation to a police officer and he is then or subsequently asked by this same or any other officer whether he would be prepared to do so again or repeat it before a magistrate, then it seems to us that subsection (2) of the same section (which is section 114 of the Criminal Procedure Code of Malaya, excluding the former Straits Settlements) must also be given due consideration, for it says: —

“(ii) No police officer or other person shall prevent or discourage by any caution or otherwise any person from making in the course of a police investigation under this Chapter any statement which he may be disposed to make of his own free will.”

The section next following provides all requisite precautions against coercion etc., and once a magistrate is satisfied that the statement about to be made is made of the deponent's own free will, uninfluenced by any threat, inducement or promise, and after due warning clearly understood that, as recorded in writing, it may be used in evidence against him, such statement in our view should be admissible in the absence of other material evidence raising doubts that the statement was a voluntary one. To go a step further, it should be noted that, once the effect of any wrongful inducement to make a confessional statement is definitely removed by careful questioning reinforced by a clear warning from the magistrate, causing the latter to be satisfied in his own mind that the statement forthcoming is made of the deponent's own free will, then the statement should be admitted in evidence: see *Abdullah bin Awang Bongkok v. Public Prosecutor*.⁽⁵⁾

In the instant case, after careful scrutiny of the inquiry made by the magistrate, both on October 27 and on November 3, 1971, we are completely satisfied that the statement of the second appellant was rightly admitted.

It was further argued that the statement in question, being self-exculpatory, did not amount to a confession and therefore, not being a confession, was

wrongfully admitted as such and should have been struck off from the record. We do not agree. In the first place, it was a clear admission of participation in the attempted robbery and consequently it was a statement having reference to the charge against him — which was a murder committed in the course of a robbery wherein there was evidence of common intention to use deadly weapons. In the second place, if the statement was not a confession, then it was not one rendered inadmissible under section 124 of the Criminal Procedure Code (S.S.) — counterpart of the Malayan Criminal Procedure Code section 113 — or any other provision of the Evidence Ordinance. Any self-incriminating statement made by an accused after an offence, in relation thereto, given to a third person, not a police officer, is clearly admissible in evidence and this is a statement of principle which has never been disputed.

On behalf of the first appellant, it was further argued that the second appellant's confessional statement should not have been used or considered as evidence, against the first appellant, of common intention. We rejected this contention: the question having been concluded by authority, being a decision of this court in *Herchun Singh & Ors. v. Public Prosecutor*⁽⁶⁾ on the proper interpretation and application of section 30 of the Evidence Ordinance 1950 (now the Evidence Act No. 56) which reads: —

"30.(1) When more persons than one are being tried jointly for the same offence, and a confession made by one of those persons affecting himself and some other of those persons is proved, the court may take into consideration the confession as against the other person as well as against the person who makes the confession."

The statement of principle therein enunciated was that the learned trial judge was right in taking the confession of one accused into consideration against the other to lend assurance to the other evidence against them in believing the accused to be guilty.

In this case, the first appellant's involvement in the robbery was admitted by him in his own statement from the dock. On this point, corroboration by the second appellant's statement was superfluous. As to proof of common intention their joint involvement in a carefully planned robbery must lead irresistibly, from the fact of two of the trio being armed with lethal weapons, to the inference of the common intention to use those weapons in case of need. In such a planned operation, it is impossible to imagine that any of the trio could have set out on their enterprise without being aware of how each was to be provided with the necessary weapon for use to intimidate or overpower their intended victim and secure their escape if obstructed by others trying to capture them.

We have scrutinised the entire record with the greatest care and satisfied ourselves that the unanimous verdict of the jury was the right and only possible one. We accordingly dismissed this appeal by both appellants.

Appeal dismissed.

GOVERNMENT OF MALAYSIA v. ROSALIND OH LEE PEK INN

[A.C.J. (Suffian F.J.) February 24, 1973]

[Kuala Lumpur — Selangor Civil Appeal No. 54 of 1971]

Administrative Law — Police officer — Contract of employment between Government and police officer — Emoluments — Housing allowance — Whether married woman police officer entitled to housing allowance — Police Ordinance, 1952, ss. 80, 81 & 82.

The respondent, a woman Inspector of Police, was while unmarried given by the government rent-free quarters or an allowance in lieu. After she married on August 20, 1962 and went to live with her husband, however, she received neither the rent free quarters nor an allowance in lieu. She applied for a rent allowance and eventually the government agreed to give her a rent allowance but with effect from March 1, 1965. She brought an action against the government for the housing allowance from the date of her marriage to February 28, 1965 and judgment was given in her favour in the Sessions Court. The Government of Malaysia appealed.

Held: (1) the contract between a public servant and the Government is of a special kind, as once appointed the Government servant acquires a status and his rights and obligations are no longer determined by consent of both parties but by statute or statutory or administrative rules made by the Government;

(2) there was nothing in the circulars and regulations in this case that entitled the respondent to a housing allowance and therefore her claim should have been dismissed.

Cases referred to:—

- (1) *Kodeeswaran v. Attorney General of Ceylon* [1970] 2 W.L.R. 456.
- (2) *Reilly v. The King* [1934] A.C. 176, 180.
- (3) *Roshan Lal v. Union of India A.I.A.* [1967] S.C. 1889.
- (4) *High Commissioner for India v. Lall* L.R. [1948] I.A. 225.

The following authorities were also cited in argument: *Terrel's case* [1953] 2 All E.R. 490; *Ridge v. Baldwin* [1963] 2 All E.R. 66, 71E; *Howell* [1951] A.C. 837, 844; A.I.R. 1928 P.C. 98; *Seksaria v. Gondal* 77 I.A. 156, 163, 173, 175, 177; *LPTB v. Upton* [1949] A.C. 155, 167, 168; *Tan Chye Choo* [1970] 1 M.L.J. 1, 4; *Sundaram* [1972] 1 M.L.J. 83; *Majumdar* [1969] 1 M.L.J. 132; *Gnanasundaram* [1966] 1 M.L.J. 157, 159; [1958] 2 All E.R. 194, 196 on word "will"; *Garey* 30 C.L.R. 132; *Gould v. Stuart* [1896] A.C. 575; *Sutton v. A. G.* 39 T.L.R. 294, H.L.; *Dunn v. Queen* [1896] Q.B. 116; *Worthington v. Robinson* [1896] L.T. 447; *Hales v. R.* [1918] 34 T.L.R. 589; *Kynaston v. The A.G.* [1933] T.L.R. 300; *Haji Ariffin v. Government of Pahang* [1969] 1 M.L.J. 6; *Lucas v. Lucas* [1943] 2 All E.R. 110; *H. C. for India v. Lall* A.I.R. [1948] P.C. 121; *Shenton v. Smith* [1895] A.C. 229; *S. of M.P. v. Mandawa* [1954] S.C. 493; *Nixon v. A. G.* [1931] A.C. 184; *Tan Chai Choo* [1970] 1 M.L.J. 1; *Minister of Agriculture and Fisheries v. Matthews* [1950] 1 K.B. 148; *Swallow & Pearson v. Middlesex O.C.* [1953] 1 W.L.R. 422; *Rhyl Urban District Council v. Rhyl Amusements Ltd.* headnote; *The Mayor of Borough of Sunderland v. Priestman*, headnote; *Maritime etc. Ltd. v. General Dairies Ltd.*, P.C. headnote; *Simond* [1951] A.C. 837, 845; *A. G. Ceylon v. A. D. Silva* [1953] A.C. 461; *Great etc. v. Charlebois* [1899] A.C. 114; *Ayr Harbour Trustees v. Oswald* [1882-3] 8 App. Cas. 623; *Munusamy* [1967] 1 M.L.J. 199; *Robertson v. Minister of Pensions* [1949] 1 K.B. 227; *Wells* [1967] 2 All E.R. 1041, 1044; *A. G. for Trinidad v. Bourne* [1895] A.C. 83, 87, 88.

CIVIL APPEAL.

Abdul Razak b'n Datuk Abu Samah (Senior Federal Counsel) for the appellant.

V. K. Palasuntheram (Ernest V. Devadason with him) for the respondent.